UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SERGE CHERY,	:
Petitioner,	:
	:
-vs-	: Civ. No. 3:01cv1883 (PCD)
	:
JOHN ASHCROFT, Attorney General of	:
the United States,	:
Respondent.	:

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that the respondent, through the Immigration and Naturalization Service ("INS"), improperly ordered him removed. For the reasons set forth herein, the petition for writ of habeas corpus is granted.

I. BACKGROUND

Petitioner is a citizen of Haiti. On July 15, 1987, he became a lawful permanent resident of the United States. On December 22, 1999, petitioner was convicted of sexual assault in the second degree in violation of CONN. GEN. STAT. § 53a-71 and was sentenced to five years' imprisonment and ten years' probation. On June 13, 2000, the INS notified him that he was subject to removal pursuant to § 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), "in that, at any time after admission you have been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, that is, a crime of violence, (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year."

On March 14, 2001, petitioner appeared before an Immigration Judge ("IJ"). On March 15, 2001, petitioner filed a motion to terminate the removal proceedings arguing that sexual assault in the second degree was not a crime of violence. On March 28, 2001, the IJ concluded that the Board of Immigration Appeals' ("BIA") decision in *In re B.*, 21 I&N Dec. 287 (BIA 1996), was dispositive of the issue. In that decision, the BIA reasoned that

> A common sense view of the sexual abuse statute, in combination with the legal determination that children are incapable of consent, suggests that when an older person attempts to sexually touch a child under the age of fourteen, there is always a substantial risk that physical force will be used to ensure the child's compliance. Sexual abuse of a child is therefore a crime of violence under 18 U.S.C. § 16(b).

In re B., 21 I&N Dec. at 289 (quoting *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993). Having determined that petitioner's offense was a crime of violence, the IJ ordered petitioner removed to Haiti.

On appeal from the IJ's order of removal, petitioner again argued that he had not been convicted of a crime of violence. The BIA, also relying on *In re B.*, held that "[b]ecause Connecticut General Statutes § 53a-71 criminalizes sexual intercourse with a victim 'unable to give consent,' we find that § 53a-71, by its nature, involves a substantial risk that physical force against the victim may be used in the course of committing the offense." Petitioner then filed the present petition for writ of habeas corpus contesting the basis for his order of removal.

II. DISCUSSION

Petitioner argues that the IJ incorrectly determined that second degree sexual assault is a crime of violence. Respondent replies that petitioner was convicted of statutory rape, which consistently has been found to be a crime of violence.[1]

Petitioner was ordered removed pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). This section provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." An "aggravated felony" includes "a crime of violence (as defined in [18 U.S.C. § 16] . . .) for which the term of imprisonment [is] at least one year . . . ." 8 U.S.C. § 1101(a)(43)(F). A "crime of violence" is defined as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[2] 18 U.S.C. § 16(b). A crime of violence thus must be (1) a felony[3] that (2) "by its nature" involves a substantial risk of the use of physical force. *See Sutherland v. Reno*, 228 F.3d 171, 175 (2d Cir. 2000).

The determination of whether CONN. GEN. STAT. § 53a-71 is a crime of violence rests on its classification pursuant to 18 U.S.C. § 16(b). Although BIA interpretations of statutes that it is charged

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1 In its memorandum in reply to the order to show cause, respondent quotes 8 U.S.C. § 1182(a)(2)(A)(I)(I), which denies visas or citizenship to aliens who have committed crimes involving moral turpitude. This section was not a stated ground for removal nor was the order based on sexual abuse of a minor, *see* 8 U.S.C. § 1101(a)(43)(A). The only question presently before this Court is whether sexual assault in the second degree, CONN. GEN. STAT. § 53a-71, is a crime of violence.

2 18 U.S.C. § 16(a) also defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Section 16(a) is inapplicable to the present case as the use of physical force is not an express element of the offense of sexual assault in the second degree.

3 There is no dispute as to whether a conviction of second degree sexual assault is a felony. CONN. GEN. STAT. § 53a-71(b) provides that second degree sexual assault is a Class C felony. A Class C felony carries a possible sentence of between one year and ten years' imprisonment. *See* CONN. GEN. STAT. § 53a-35a(6). A crime is a "felony" under federal law if the maximum term of imprisonment is more than one year. *See* 18 U.S.C. § 3559(a).

with administering are entitled to substantial deference, *see Sutherland*, 228 F.3d at 173-74, no deference is accorded BIA interpretations of state or federal criminal laws, which are reviewed *de novo*. *Id.* at 174. As the present case involves the determination of whether an offense is a crime of violence pursuant to a federal criminal statute, 18 U.S.C. § 16, the BIA's decision is subject to *de novo* review.

In ascertaining whether a particular offense constitutes a crime of violence, the focus is on the intrinsic nature of the offense rather than the circumstances of the particular violation. *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001). This categorical approach requires evaluation of "the minimum criminal conduct necessary to sustain a conviction under a given statute." *Id.* (internal quotation marks omitted). Stated another way, the offense, as specified in the statute and viewed in the abstract, must inherently involve the use of force, and any conduct proscribed by the statute must by its nature entail violence. *See id.*

As a preliminary matter, the proper starting point for a categorical analysis must be identified. Both petitioner and respondent argue that the subsection of which petitioner was convicted specifically prohibits sexual intercourse with children between the ages of thirteen and fifteen, *i.e.* that CONN. GEN. STAT. § 53a-71(a)(1) is the relevant statute rather than § 53a-71 in its entirety. As presented, the argument is unsupported by the state court short form information and judgment documents,[4] which

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[4] The short form information indicates only that petitioner was charged with "sexual assault 2nd" in violation of "General Statute No. 53a-71." The judgment form provides no greater elucidation on the specific subsection relevant to petitioner. Although the occasion may arise when it is appropriate to review facts contained within charging papers and judgment documents, for example when a criminal statute consists of a multitude of offenses, some of which may be considered as a crime of violence and some of which may not be so considered, *see Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000), nothing suggests that a Court may otherwise proceed beyond those documents to categorize an offense. All offenses described in § 53a-71 as prohibited are sexual acts, and respondent provides no basis on which to distinguish the several acts described in § 53a-71 and/or § 53a-71(a)(1) as more or less properly to be construed as crimes of violence. *See*

together indicate only that petitioner was charged and convicted of a violation of § 53a-71.[5] The entire statute, § 53a-71, is therefore subject to categorical analysis.[6] *See Dalton*, 257 F.3d at 204.

The analysis begins with the text of CONN. GEN. STAT. § 53a-71, which provides that

> A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person; or (2) such other person is mentally defective to the extent that such other person is unable to consent to such sexual intercourse; or (3) such other person is physically helpless; or (4) such other person is less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare; or (5) such other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over such other person; or (6) the actor is a psychotherapist and such other person is (A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception; or (7) the actor accomplishes the sexual intercourse by means of false representation that the sexual intercourse is for a bona fide medical purpose by a health care professional; or (8) the actor is a school employee and such other person is a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor.

Sutherland, 228 F.3d at 177 n.5; *Michel v. INS*, 206 F.3d 253, 265 n.3 (2d Cir. 2000).

5 It is only by reviewing the affidavit accompanying the arrest warrant that one may discern any specifics of the charge. The affidavit indicates that petitioner was arrested for having sexual intercourse with a fourteen-year-old girl.

6 The IJ recognized that the entire statute was subject to analysis in stating "[t]he Court, upon review of Section 53a-71 of the Connecticut General Statutes, finds that this is essentially a statutory rape provision, involving sexual intercourse with an individual who is not legally able to consent, based on either age, mental capacity or other issues such as, between a patient and a therapist or other such relationship including a school employee." The BIA acknowledged the same stating "[b]ecause the conviction documents in the record fail to identify the specific provision under which the [petitioner] was convicted, we must consider Connecticut General Statutes § 53a-71(a) in its entirety to determine whether a conviction under all of its sections would constitute a crime of violence." Both failed to do so and additionally embroidered upon the strict language of the statute.

A fair reading of the statute reveals that the minimum conduct necessary for commission of sexual assault in the second degree is (1) sexual intercourse with (2) a member of a protected class. *See Dalton*, 257 F.3d at 204. The statute does not on its face require proof of either consent or non-consent of the victim,[7] which is at variance with the decisions of both the IJ and the BIA. The consent of a victim is irrelevant to a violation of § 53a-71. *See State v. Arroyo*, 181 Conn. 426, 436, 435 A.2d 967 (1980). The statute does not inherently involve use of force, *see Dalton*, 257 F.3d at 204, nor may it be read as expressly or implicitly involving the lack of consent of the victim, from which the use of force may be inferred. *See Sutherland*, 228 F.3d at 176. The IJ and BIA injected an element of non-consent into a statute which on its face has no such requirement, thus improperly categorizing the statute as a crime of violence.

In an apparent attempt to parse the statute into crimes of violence and nonviolence, and in support of its argument that the BIA properly affirmed the IJ's order, respondent argues that the BIA and "federal courts have consistently held that statutory rape and other crimes involving sexual abuse of a child are crimes of violence." *See Sutherland*, 228 F.3d at 176; *United States v. Wood*, 52 F.3d 272 (9th Cir. 1995); *Ramsey v. INS*, 55 F.3d 580, 583-84 (11th Cir. 1995); *Reyes-Castro*, 13 F.3d at 379; *United States v. Bauer*, 990 F.2d 373, 375 (8th Cir. 1993); *United States v. Rodriguez*, 979 F.2d 138 (8th Cir. 1992); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990). Such inductive reasoning is inappropriate given the specific nature of the analysis involved and misapprehends the analysis set forth in *Sutherland* as this case did not necessarily involve rape nor

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[7] The only reference to "consent" in the statute is in § 53a-71(a)(2), which prohibits sexual intercourse with a person "mentally defective to the extent that such other person is unable to consent to such sexual intercourse." Section (a)(3) implies an inability to consent. Sections (a)(4),(5),(6),(7) and (8) describe relations in which intercourse is prohibited as arising from what may fairly be described as dominant relations.

sexual abuse of a child with a connotation derived from "rape" and/or "abuse." Section 53a-71 includes neither of the words "rape" or "abuse."

The issue in *Sutherland* was whether a conviction for violation of MASS. GEN. LAW ch. 265, § 13H, entitled indecent assault and battery on a person fourteen or older, was a crime of violence.[8] Section 13H provides that "[w]hoever commits an indecent assault and battery on a person who has attained age fourteen shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment for not more than two and one-half years in a jail or house of correction." Indecent assault is defined as

> [a] touching ... [that] when, judged by the normative standard of societal mores, is violative of social and behavioral expectations, in a manner which is fundamentally offensive to contemporary moral values and which the common sense of society would regard as immodest, immoral, and improper. So defined the term indecent affords a reasonable opportunity for a person of ordinary intelligence to know what is prohibited.

Sutherland, 228 F.3d at 176 (internal quotation marks omitted). "Significantly, lack of consent is also a requisite element of a § 13H violation." *Id.*

Unlike a conviction for § 13H, § 53a-71 does not on its face or as an implied element require proof of the victim's lack of consent nor of an indecent assault and battery, obvious incorporations of

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[8] The petitioner in *Sutherland* was ordered removed pursuant to 8 U.S.C. § 1227(a)(2)(E)(I), which provides that "[a]ny alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government." It is of little moment that petitioner here was removed pursuant to § 1227(a)(2)(A)(iii) as both sections involve an analysis of whether the offense was a crime of violence pursuant to 18 U.S.C. § 16.

violence.[9] In indecent assault and battery cases, "the non-consent of the victim is a touchstone for determining whether a crime involves a substantial risk that physical force against the person . . . may be used." *Sutherland*, 228 F.3d at 175 (internal quotation marks omitted). When such non-consent inheres in an offense, "any violation . . . by its nature, presents a substantial risk that force may be used in order to overcome the victim's lack of consent and accomplish the [prohibited act]." *Id.* at 176. Section 53a-71 has no consent element. It thus criminalizes the act of sexual intercourse in several differing circumstances without requiring an element of conduct, actual or implied, characterized as violent.

Contrary to respondent's argument, *Sutherland* may not be read as simply equating a sexual act with a pubescent teenager with a crime of violence. A reading of *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1997), counsels against establishing such a *per se* rule. *Shannon* addressed "whether sexual intercourse, not shown or conceded to be forcible, with a 13 year old is a crime of violence." *Id.* at 385. In answering the question in the affirmative, the Court interpreted "crime of violence" as defined in the *Sentencing Guidelines*, as "conduct that presents a serious potential risk of physical injury to another," U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2), rather than § 16(b)'s definition as a crime that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." In contrast to § 4B1.2(a)(2), the more restrictive definition of § 16(b) "contemplates only intentional conduct and refers only to

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[9] Battery by definition requires physical contact. *See* BLACK'S LAW DICTIONARY 152-53 (6th ed. 1990) ("the unlawful application of force to the person of another"). In contrast, an assault may be defined either as a technical battery, an apprehension of physical contact or as an attempted battery. *See id.* at 114. Unlike in *Sutherland*, where indecent assault and battery was defined outside the statute, one need not look beyond the statute for elements of the offense under § 53a-71(a).

those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force . . . . not [to] an accidental, unintended event." *Dalton*, 257 F.3d at 207-08. The analysis in *Shannon* was further not confined to analyzing the minimum conduct that creates the offense, as in the present case. *See Shannon*, 110 F.3d at 388. The Court acknowledged that the offense was "more often thought of as a 'morals offense' than as a 'crime of violence.'" *Id.* at 389. Ultimately, the crime was characterized as a crime of violence based on the "injury" resulting from unwanted pregnancy and venereal disease, *see id.* at 388, neither of which could be considered a "use of force" sufficient to meet the definition of crime of violence pursuant to § 16(b).[10]

Characterization of the offense as a crime of violence would also be at odds with Connecticut's legislative statement on the nature of § 53a-71. In defining "sexually violent offense" for purposes of sexual offender registration laws, *see* CONN. GEN. STAT. § 54-252(a), Connecticut excludes from the definition a violation of CONN. GEN. STAT. § 53a-71(a)(1), *see* CONN. GEN. STAT. § 54-250(11), the very offense argued to be a crime of violence. Although this legislative statement is not dispositive of whether § 53a-71 should be interpreted as a crime of violence pursuant to § 16(b), *see Dalton*, 257 F.3d at 204, it is certainly evidence as to why § 53a-71 should not be so construed.

The determination that sexual assault in the second degree is not a crime of violence in no way implies that the conduct proscribed by § 53a-71 is socially acceptable, nor that those protected by the statute are undeserving of the protection so provided. The issue before this Court is not the validity of a

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[10] The closing remarks of the majority in *Shannon* are also telling. "From the length of this opinion and the contrary judgment of the panel majority, it should be apparent that the interpretive issue is a difficult one. We cannot be certain that we have gotten it right. . . . We urge the Sentencing Commission to clarify the crime of violence guideline--more particularly as our decision leaves unresolved the proper treatment of cases in which the victim of the statutory rape is above the age of 13." *Id*. at 389.

criminal statute, but rather whether the statute satisfies a particular definition for purposes of an order of removal. The INA provides alternative grounds on which an order of removal may have been appropriate, however the order of removal is limited to, and judged herein, on the basis of, petitioner's having committed a crime of violence. Having so limited the basis for the order, it need only be said that an element of violence will not be read into a criminal statute where none is apparent. In § 53a-71, as defined by § 53a-71(a)(1)-(a)(8), the criminalized act is simply a matter of sexual intercourse between specified persons. Neither consent, nor non-consent, is a necessary element of the offense or a defense. In short, the neutrality of the statute relied on by respondent does not lend itself to any implications of a substantial, or indeed any, risk of force or violence being used. Thus petitioner cannot be found to have been convicted of a crime of violence.

III. CONCLUSION

The petition for writ of habeas corpus (Doc. 1) is **granted**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, May ___, 2002.

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Peter C. Dorsey
United States District Judge